IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6621

GILBERT FRANKLIN BECK, Petitioner,

v.

STATE OF ALABAMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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GILBERT FRANKLIN BECK,

Petitioner,

-v.-

STATE OF ALABAMA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Gilbert Franklin Beck, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Alabama without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. Counsel has not yet received an affidavit from the petitioner, who is in the custody of the State of Alabama under sentence of death at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Beck's affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

David Klingsberg
KAYE,SCHOLER, FIERMAN, HAYS
& HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

GILBERT FRANKLIN BECK, :

Petitioner, :

-v- :

STATE OF ALABAMA, : AFFIDAVIT

Respondent. :

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DAVID KLINGSBERG, being duly sworn, states:

1. I am counsel to Gilbert Franklin Beck in Beck v. Alabama, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Beck's motion for leave to proceed in forma pauperis. My representation of Mr. Beck is without remuneration.

2. Mr. Beck is presently in the custody of the State of Alabama under sentence of death and is not immediatately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Beck by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Beck is attached hereto.

3. Petitioner had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Beck is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Beck is entitled to redress in this cause for the reason that his conviction and sentence of death were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

David Klingsberg
DAVID KLINGSBERG

Sworn to before me this
30th day of April, 1979.

Rhoda Ginsberg
NOTARY PUBLIC

My commission expires:

RHODA GINSBERG
Notary Public, State of New York
No. 31-1440080
Qualified in New York County
Commission Expires March 30, 1981

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

GILBERT FRANKLIN BECK, :
Petitioner, :
-v- :
STATE OF ALABAMA, :
Respondent. :

I, Gilbert Franklin Beck, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration on my present appeal.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows: I was convicted in the Circuit Court of Etowah County, a trial court of the State of Alabama of robbery-intentional killing and was sentenced to death. I am being held under sentence of death at the William C. Holman Unit of the Alabama prison system at Atmore, Alabama. My conviction and sentence for robbery-intentional killing were affirmed by the Supreme

Court of the State of Alabama on December 8, 1978, I believe that errors were committed during the course of my trial in violation of my constitutional rights and that the death sentence was imposed upon me in violation of my constitutional rights.

GILBERT FRANKLIN BECK

STATE OF ALABAMA

COUNTY OF

The foregoing affidavit of Gilbert Franklin Beck was subscribed and sworn to before me this day of , 1979.

NOTARY PUBLIC

My commission expires:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Petitioner Gilbert Franklin Beck prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama affirming his conviction and sentence of death. The judgment of the Supreme Court of Alabama was entered on December 8, 1978.

Opinions Below

The opinion of the Supreme Court of Alabama, reported at 365 So.2d 1006 (Ala. 1978) and including dissents by two Justices, is attached as Appendix A. The Alabama Supreme Court affirmed an opinion of the Court of Criminal Appeals of Alabama, reported at 365 So.2d 985 (Ala. Crim. App. 1978) and attached as Appendix B.

Jurisdiction

The judgment and opinion of the Supreme Court of Alabama was entered on December 8, 1978. On January 8, 1979, the Supreme Court of Alabama entered an order setting March 30, 1979 as the date for petitioner's electrocution. On February 26, 1979, this

Court, per Mr. Justice Powell, granted petitioner's motion for an extension of time to May 1, 1979 within which to file this petition for a writ of certiorari.[1] This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

Questions Presented

The Alabama death penalty statute, § 13-11-1 et seq., Alabama Code (1975), under which petitioner and more than 35 other prisoners have been convicted of capital crimes and sentenced to death, raises important constitutional questions:

1. WHETHER ALABAMA'S REFUSAL TO ALLOW THE JURY TO FIND A CAPITAL DEFENDANT GUILTY OF A LESSER INCLUDED OFFENSE VIOLATES RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Unlike any other death penalty statute in the United States, Alabama's law precludes juries from considering whether defendants charged with capital offenses are guilty of a lesser included offense. In Keeble v. United States, 412 U.S. 205, 213 (1973), a non-capital case, this Court held that any statute which foreclosed juries from receiving a lesser-offense instruction "would raise difficult constitutional questions." See also Gregg v. Georgia, 428 U.S. 153, 199-200, n.50 (1976). By forcing capital juries to make an all-or-nothing choice on the issue of guilt, Alabama's death penalty statute has produced startling results. Of the first 50 defendants who pleaded not guilty and were tried under the law, 48 were convicted; of the first 45 sentenced after

1 A copy of Mr. Justice Powell's order is attached as Appendix C. On March 21, 1979, the Supreme Court of Alabama issued an order staying petitioner's execution until further order of that Court.

trial, 37 received death sentences.[2] Since Alabama continues to permit lesser-offense instructions in non-capital cases, its death penalty statute raises the question whether capital defendants may be singled out for deprivation of an important procedural safeguard.

2. WHETHER ALABAMA'S REQUIREMENT IN CAPITAL CASES THAT THE JURY "SHALL" SENTENCE DEFENDANTS TO DEATH UPON A VERDICT OF GUILTY WITHOUT CONSIDERATION OF MITIGATING CIRCUMSTANCES VIOLATES PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND UNDER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

This provision of Alabama's law presents for this Court's determination (a) whether the principles set forth in Woodson v. North Carolina, 428 U.S. 280 (1978), forbid a mandatory death sentence by a trial jury, which must affect materially the subsequent review of the jury's sentence by the trial judge, and (b) the question reserved in this Court's decision in Lockett v. Ohio, 98 S.Ct. 2954, 2967, n.16 (1978), whether the Constitution requires that the jury, rather than the judge alone, have an opportunity for consideration of mitigating circumstances which this Court also held in Woodson is virtually always an essential prerequisite of a constitutional death sentence.

3. WHETHER ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE BY POSTPONING CONSIDERATION OF SENTENCE BY THE TRIAL JUDGE UNTIL THE JURY HAS MANDATORILY MADE AN INITIAL DETERMINATION THAT THE DEATH PENALTY "SHALL" BE IMPOSED.

This provision of Alabama's law places the trial judge's sentencing determination under the cloud of the jury's initial

2 Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S., October Term 1978, No. 78-5696), at 10, 35.

mandatory death sentence and thus raises the question whether it is consistent with this Court's holding that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

4. WHETHER ALABAMA'S DEATH PENALTY STATUTE IS SO VAGUE AND HAS BEEN APPLIED SO INCONSISTENTLY THAT IT VIOLATES PETITIONER'S RIGHTS TO REASONABLE NOTICE UNDER THE DUE PROCESS CLAUSE AND INFRINGES ON HIS RIGHT UNDER THE EIGHTH AMENDMENT NOT TO HAVE THE DEATH PENALTY IMPOSED IN AN ARBITRARY, WANTON, UNRELIABLE OR DISCRIMINATORY MANNER.

One of the aggravating circumstances specified in Alabama's law for consideration by the trial judge -- whether the offense was "especially heinous, atrocious, or cruel" -- is vague on its face, has been inconsistently applied, and raises the question of whether and to what extent the void-for-vagueness doctrine should be invoked with respect to sentencing provisions in a capital punishment statute.

5. WHETHER THE OVERALL OPERATION OF ALABAMA'S DEATH PENALTY STATUTE ENCOURAGES SUCH UNRELIABLE FINDINGS ON THE ISSUES OF GUILT AND SENTENCE AND IS SO FUNDAMENTALLY UNFAIR THAT IT VIOLATES PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT CLAUSES.

By stripping petitioner of vital procedural safeguards at each stage of the capital punishment proceeding, Alabama's death penalty statute has "stacked the deck" against petitioner in violation of this Court's ruling in Witherspoon v. Illinois, 391 U.S. 510, 522, n.22, 523 (1968), that the capital punishment decision cannot be made on "scales . . . deliberately tipped toward death."

* * *

Relevant Constitutional and Statutory Provisions

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Alabama law: Section 13-11-1 through Section 13-11-9, Code of Alabama (1975); Section 15-17-1, Code of Alabama (1975). These statutes are set forth as Appendix D to this petition.

Statement of the Case

Petitioner was indicted by an Etowah County (Ala.) grand jury on charges of committing a robbery on November 8, 1976, during the course of which he was alleged to have intentionally killed Mr. Roy Malone, the victim of the robbery.[3] Other than petitioner, there were no eyewitnesses who testified at the trial as to the actual killing of Mr. Malone. According to the opinion of the Court of Criminal Appeals below, petitioner, who took the stand in his own defense, admitted that he went with an accomplice to Mr. Malone's house that day in order to rob him of a large sum of cash.[4] Petitioner testified that he never contemplated that any physical injury would be inflicted on Mr. Malone (Tr. 588). He denied killing Mr. Malone (Tr. 594). According to petitioner, it was his accomplice, Mr. Roy Clements, who unexpectedly killed Mr. Malone by knifing him (Tr. 592). Petitioner denied that he carried a knife and insisted that he protested Clements' knife assault on Mr. Malone as soon as it occurred (Tr. 592, 594). Petitioner said that he did not remove anything from Mr. Malone's

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3 Petitioner was indicted under § 13-11-2(a)(2) of the Alabama death penalty statute, which specifies the following capital offense: "Robbery or attempts thereof when the victim is intentionally killed by the defendant."

4 Beck v. State, 365 So.2d 985, 995 (Ala. Crim. App. 1978).

house (Tr. 593). A few hours after the robbery, petitioner was arrested by local police authorities and has been incarcerated ever since.

Although petitioner's accomplice, Clements, was separately indicted, convicted, and sentenced to death for robbery-intentional killing, his conviction has been reversed by the Supreme Court of Alabama on state-law grounds.[5]

The Trial Court's Instruction to the Jury

The trial judge's charge did not permit the jury to convict petitioner on the lesser included offense of robbery.[6] Under Alabama's statute, the trial judge's charge gave the jurors only two alternatives: voting either for acquittal or for conviction of the capital crime of robbery and intentional killing (Tr. 743, 746).

The trial judge also charged that if petitioner "is acquitted in this case he can never be tried for anything he ever did to Roy Malone" (Tr. 743).

By virtue of this novel charge, the jury not only was foreclosed from finding petitioner guilty of any crime other than robbery-intentional killing, but was also informed that if it acquitted petitioner, no subsequent charge could be brought on

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5 Ex parte Roy Frank Clements (Ala. Supr. Ct., No. 77-643, 1978), unreported.

6 Nor did the trial judge give a lesser offense instruction which would have allowed the jury to find petitioner guilty of the crime of conspirary, a non-capital offense (Alabama Code § 13-9-20 (1975). Instead, even though the list of crimes in the Alabama death penalty law does not include conspiracy, the judge instructed the jury that petitioner could be convicted of the capital crime charged in the indictment even if the jury found that he was merely a conspirator. Petitioner's counsel's objection to this instruction (Tr. 748) was overruled (Tr. 750).

a lesser offense such as robbery. Under the judge's instruction, the jury was pressured to find petitioner guilty of a capital offense even if it really believed he was guilty only of robbery or some other lesser offense.

On the issue of sentence, the trial judge instructed the jury that its deliberations were to be governed by § 13-11-2(a) of the Alabama death penalty statute, which the court paraphrased as follows: "If the jury finds the Defendant guilty they shall fix the punishment of death . . . " (Tr. 742). Stressing the mandatory nature of the jury's sentencing determination upon a finding of guilt, the court stated:

> "If after you have considered all the testimony, all the evidence in the case and all proper and reasonable inferences therefrom you are satisfied beyond a reasonable doubt the Defendant was guilty of the robbery and the willful killing of Roy Malone, then the form of your verdict shall be, 'We, the jury, find the Defendant, Gilbert Franklin Beck, guilty of robbery with aggravated circumstances where Roy Malone was intentionally killed as charged in the indictment and we fix the punishment at death." (Tr. 746-47; emphasis added).

Following the jury's guilty verdict and sentence of death (Tr. 758), the trial judge scheduled a hearing to consider aggravating and mitigating circumstances and to decide whether to accept the death sentence as fixed by the jury (Tr. 758).

At the subsequent hearing before the judge, the trial judge rejected petitioner's motion to empanel a jury to consider aggravating and mitigating circumstances (Tr. 761-62). Petitioner reiterated his earlier testimony that he was not involved in Mr. Malone's death and had no idea that the victim might be killed (Tr. 779).

Following oral argument, the trial judge found aggravating circumstances pursuant to the Alabama death penalty law, in-

cluding the following corresponding to § 13-11-6(8) of Alabama's law: "The capital felony was especially heinous, atrocious, or cruel" (Tr. 813). The trial judge also stated at this point that "two or more human beings [were] intentionally killed by the defendant by one or a series of acts" (Tr. 813). This statement is inexplicable, since petitioner was tried only for the murder of Mr. Malone and no evidence was introduced implicating him in any other death. Nor did the trial judge provide any other reasons why petitioner's situation differed from other robbery-intentional killings, even though the statute's use of the word "especially" necessitates such an explanation.

After listing the aggravating circumstances, the trial judge found a single mitigating circumstance under § 13-11-7(1) of the law: "the Defendant has no significant history of prior criminal activities" (Tr. 813).

The trial judge gave no weight to testimony concerning petitioner's exemplary employment history, to the fact that he had served honorably in the U.S. Marines (Tr. 775), to the fact that petitioner's requests to take a lie-detector test had been refused (Tr. 781), or to testimony concerning petitioner's psychological difficulties (Tr. 782, 798-800).

The trial judge made no written findings, did not make any attempt to weigh the aggravating and mitigating circumstances, and simply confirmed the jury's death sentence after perfunctorily listing aggravating and mitigating circumstances by repeating or paraphrasing the statutory language (Tr. 812-13). Petitioner's unsuccessful appeals to the Alabama Court of Criminal Appeals and to the Alabama Supreme Court followed.

How the Federal Questions Were Raised and Decided Below

Petitioner's contention that Alabama's procedures for

trial and sentence in capital felony cases violate the United States Constitution were raised before trial in a motion to quash the indictment (Tr. 39-45), which the trial judge denied (Tr. 105). Petitioner's counsel also objected to the trial judge's refusal to permit a jury to consider aggravating and mitigating circumstances relevant to the issue of sentence (Tr. 761-62). Petitioner pressed these constitutional objections and other objections based on state-law grounds before the Alabama Court of Criminal Appeals, which rejected them on the merits in a lengthy opinion (Appendix B), and in his petition to the Alabama Supreme Court, which affirmed the Court of Criminal Appeals in a 1-page opinion (Appendix A) and rejected petitioner's federal constitutional arguments on the authority of a prior decision.[7]

* * *

Reasons for Granting the Writ

I.

ALABAMA'S PRECLUSION OF A LESSER INCLUDED OFFENSE INSTRUCTION IN CAPITAL CASES VIOLATES PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

This case squarely presents the "difficult constitutional questions" which this Court in Keeble v. United States, 412 U.S. 205, 213 (1973), stated are raised by statutory preclusion of an instruction that a jury may find a defendant guilty of a lesser included offense. These constitutional questions are even more serious where, unlike Keeble (a non-capital case), the statute gives the jury the alternatives of finding the defen-

7 Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, 99 S.Ct. 1034 (1979).

dant guilty of a capital offense, leading to a death sentence, or allowing him to be fully exonerated where there is strong evidence that he is guilty of a serious -- but non-capital -- offense.

Keeble, which held that the federal Major Crimes Act could not be construed to preclude a lesser-offense instruction, summarized the vital protection afforded by such an instruction as follows:

> "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-13 (emphasis in original and added).

Similarly, the plurality opinion in Gregg v. Georgia, supra, held that a criminal justice system which, among other things, precluded lesser-offense instructions "would be totally alien to our notions of criminal justice" and "would be unconstitutional." 428 U.S. at 199-200, n.50. In rejecting the argument that availability of a lesser-offense instruction provided capital juries with too much discretion to satisfy the concerns set forth in Furman v. Georgia, 408 U.S. 238 (1972), the Court in Gregg eliminated any doubt as to the constitutional importance of preserving a capital defendant's right to such an instruction.

Petitioner's rights at trial to fair jury fact-finding on the issue of guilt were severely undermined by the unavailability of a lesser-offense instruction. Under Alabama law applicable in non-capital cases, there is no question that he would

have been entitled to such an instruction.[8] Under Alabama's death penalty statute, which prohibits such instructions,[9] the jury was given an all-or-nothing choice on the question of petitioner's guilt. The prejudice which petitioner thereby suffered was compounded by the trial judge's instruction that in the event of acquittal, petitioner "can never be tried for anything that he ever did to Roy Malone" [the decedent-victim] (Tr. 743; emphasis added).

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8 E.g., Fulghum v. State, 272 So.2d 886, 890 (Ala. Supr. Ct. 1973) ("A defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable theory from the evidence which would support the position"); see also Alabama Code, § 15-17-1 ("When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony of misdemeanor"). Since petitioner testified that he did not kill the decedent, never contemplated that his accomplice might do so, and protested against his accomplice's fatal knife assault on the decedent, he clearly satisfied the Alabama rule applicable in all non-capital cases and, at the very least, would have been entitled to an instruction on the lesser offense of robbery. The federal rule for lesser-offense instructions is summarized in Keeble v. United States, 412 U.S. 205, 208 (1973) ("the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater").

9 Alabama Code § 13-11-2(a) (1975): "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses . . ." (emphasis added). See also Chief Justice Torbert's concurring and dissenting opinion in Jacobs v. State, 361 So.2d 640, 646 (Ala. 1979), cert. denied, 99 S.Ct. 1034 (1979) ("the capital jury in Alabama cannot convict a defendant for a lesser included offense").

A. Due Process

The statute's preclusion of lesser-offense instructions jeopardizes the fundamental fairness of capital trials in Alabama. It necessarily undermines a capital defendant's presumption of innocence and dilutes the requirement that he be found guilty beyond a reasonable doubt. By precluding a finding of guilt on an intermediate offense, the Alabama law and the trial judge's instruction in this case placed an intolerable strain on the jury's ability to make a fair finding on the issue of guilt or innocence in a capital case.

This Court has ruled consistently that the due process clause necessitates stringent safeguards in criminal cases to minimize the margin for erroneous convictions. Thus, in In re Winship, 397 U.S. 358 (1970), the Court held that the beyond-reasonable-doubt standard itself was constitutionally required lest there be "doubt whether innocent men are being condemned" and in order to establish "confidence" that a jury's finding of guilt has been made with "utmost certainty." Id at 364. See also Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

The considerations set forth in Winship underscore the need for lesser-offense instructions in capital cases, particularly where, as here, there is strong evidence that the defendant is guilty of a serious lesser crime. Keeble expressly recognized the "substantial risk" that foreclosure of a lesser-offense instruction may induce fact-finding error on the part of even the most conscientious jurors. Moreover, without such an instruction, the prospect of acquittal is likely to be so repulsive that conviction on the offense charged may seem the only alternative even where, as in this case, there is a serious question as to

the defendant's guilt on the greater charge.[10]

Since Winship, this Court has sharply scrutinized federal and state criminal procedures to ensure that defendants' presumption of innocence is not impaired and the risk of conviction increased by impermissible influences on jurors' judgment. E.g., Cool v. United States, 409 U.S. 100 (1972) (per curiam) (due process violated by instruction that accomplice's testimony in favor of defendant should not even be "considered" unless the jury first believed it beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684 (1975); Estelle v. Williams, 425 U.S. 501 (1976).

Alabama's absolute rule[11] against consideration of a

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10 The lower courts have also recognized that foreclosure of a lesser-offense instruction, where otherwise appropriate, jeopardizes defendants' fundamental rights to fair jury fact-finding. E.g., Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975) (holding Keeble should be applied retroactively in § 2255 collateral proceeding because deprivation of a lesser-offense instruction "affected a right which Keeble recognized as fundamental against the background of the Due Process Clause"); United States v. Comer, 421 F.2d 1149, 1153-1154 (D.C. Cir. 1970) (reversing conviction for failure to give lesser-offense instruction on the ground that such an instruction would ensure that the jury would not return a verdict "in disregard to the proof"); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied, 98 S.Ct. 1647 (1978) ("the court should give the form of [lesser-offense] instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under less rigorous instruction is his readier conviction for a lesser rather than greater crime"); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D. Pa. 1968) (failure to give lesser-offense instruction, where otherwise appropriate, constitutes fundamental error requiring federal habeas corpus relief). Accord: United States ex rel. Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974).

11 The Alabama rule is in effect an irrebutable presumption against a finding of guilt on a lesser included offense. This Court has frequently invalidated irrebutable factual presumptions in cases involving fundamental rights. E.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1973); Leary v. United States, 395 U.S. 6 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

lesser-offense finding jeopardizes capital defendants' rights at least as much as the practices invalidated in the post-Winship line of cases, none of which involved a capital offense. By coercing the jury to choose among extremes, Alabama's law erects an "artificial barrier" to fair fact-finding on the issue of guilt. Cool v. United States, supra, 409 U.S. at 104. Particularly where a man's life is in the balance, this barrier is constitutionally impermissible. Gregg v. Georgia, supra, 428 U.S. at 187 ("when a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) ("I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirement of the Constitution in a capital case"). See also Woodson v. North Carolina, supra, 428 U.S. at 305 (because of the qualitative difference between capital and non-capital cases, there is "a corresponding difference in the need for reliability on the determination that death is the appropriate punishment in a specific case").

Since Alabama's decision to preclude lesser-offense instructions in capital cases, startling results have been achieved. During the first 33 months of the law's operation, Alabama prosecutors attained a 96% conviction rate in capital cases where the defendant pleaded not guilty and an 82% death sentence rate where the jury rendered a verdict of guilty.[12] Compare Woodson v. North Carolina, supra, 428 U.S. at 295 n.31

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12 Indeed, this feature of Alabama's law so plainly subverts the principles established by this Court in Winship, Mullaney, Estelle, Cool, Gregg and Keeble that a per curiam reversal of petitioner's conviction and sentence, as in Cool, would be appropriate.

("Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases"). This fact underscores the need for this Court to review Alabama's decision to preclude lesser-offense instructions in capital cases.

B. Equal Protection

Alabama's law also raises a serious question under the equal protection clause. Since non-capital defendants in Alabama continue to have the safeguard of a lesser-offense instruction, the law singles out capital defendants and thereby burdens their fundamental right, recognized in Winship and Keeble, to unprejudiced jury fact-finding on the issue of guilt.

Because of its discriminatory impact on this fundamental right, the statute must be strictly scrutinized to determine whether it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See also Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-43 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972). Alabama's statute cannot withstand scrutiny under this standard.

The only interest that Alabama has asserted in support of the statute's preclusion of lesser-offense instructions in capital cases is the need to comply with this Court's ruling in Furman by controlling undue jury discretion and nullification in capital cases.[13] This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns expressed in Furman for consistently-applied capital senten-

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13 See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 24.

cing could be satisfied by capital punishment statutes which permit juries to receive lesser-offense instructions on the issue of guilt.[14] The Gregg plurality opinion of Justices Stewart, Powell and Stevens stated that elimination of lesser-offense instructions would be "totally alien to our notions of criminal justice," 428 U.S. at 199-200, n.50. Thus, as demonstrated by the Georgia, Florida and Texas statutes upheld by this Court, there is no need to interfere with the jury's guilt-finding process in order to comply with Furman. Those states' laws establish that there is a less restrictive means available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution.[15]

In sum, it would be inconsistent with this Court's rulings in Gregg, Proffitt and Jurek to conclude that Alabama's law is "necessary" to promote the objective of consistent capital sentencing. Nor is the preclusion of lesser-offense instructions the least burdensome means of promoting those goals. Accordingly, under established precedents of this Court, there is a serious question as to whether the statute violates the equal protection clause.[16]

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14 See Gregg v. Georgia, supra, 428 U.S. at 163, 199; Proffitt v. Florida, 428 U.S. 242, 254 (1976); Jurek v. Texas, 428 U.S., 262, 274 (1976).

15 See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 24.

16 E.g., Dunn v. Blumstein, supra, 405 U.S. at 343 ("Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives . . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protested activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' . . . ."") (citations omitted); Zablocki v. Redhail, supra.

* * *

In the last analysis, Alabama's decision to abolish lesser-offense instructions in capital cases constitutes a serious misreading of Furman and deprived petitioner of a fair trial.[17]

II.

ALABAMA'S REQUIREMENT THAT JURIES MUST IMPOSE A DEATH SENTENCE WITHOUT CONSIDERATION OF MITIGATING CIRCUMSTANCES VIOLATES THE DUE PROCESS CLAUSE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Unlike any death penalty statute previously upheld by this Court, Alabama's death penalty law specifically precludes the jury from considering aggravating or mitigating circumstances relevant to the issue of whether the death penalty should be imposed. Once the jury makes a finding of guilt, the statute requires that "it shall fix the punishment at death." (§ 13-11-2(a).)[18] Aggravating or mitigating circumstances are considered only by the trial judge at a subsequent hearing at which he de-

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17 Alabama's approach to the question of lesser-offense instructions is also unconstitutional under the "cruel and unusual punishment" clause of the Eighth Amendment. The Eighth Amendment applies not merely to the sentencing process, but also to the guilt-finding process. Robinson v. California, 370 U.S. 660 (1962). Because of its uniqueness, its severe prejudice to capital defendants' rights to accurate jury fact-finding, and its startling effects in practice, Alabama's decision to preclude lesser-offense instructions fails to reflect "contemporary community values" and "evolving standards of decency," as the Eighth Amendment requires. E.g., Woodson v. North Carolina, supra, 428 U.S. at 295, 301. Indeed, this case provides even more compelling grounds for this Court's intervention than Woodson, which involved a statute which was not at all unique to North Carolina. Woodson v. North Carolina, supra, 428 U.S. at 297.

18 This provision was read to the jury at petitioner's trial (Tr. 742-743) and has been described by Alabama authorities as follows: "it requires the jury to phrase a guilty verdict in terms of the punishment of death." Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra, at 11.

cides whether to "refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole." § 13-11-4.

These provisions raise serious constitutional questions which this Court has yet to decide.

First, by failing to permit the jury to consider aggravating and mitigating circumstances before imposing sentence, the Alabama law is contrary to this Court's pronouncements on the vital role of the jury in the death-sentencing process. Thus, in Witherspoon, the Court stressed that juries "express the conscience of the community on the ultimate question of life or death" and must not be "organized to return a verdict of death" (391 U.S. at 519, 521). See also Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("In the ultimate analysis only the jury can strip a man of his liberty or his life").

Under this line of cases, Alabama's law raises a serious constitutional question because it does not allow the jury to "express the conscience of the community" in the light of evidence of aggravating or mitigating circumstances relevant to the life-death determination. Rather, Alabama's law strips defendants of the vital constitutional safeguard afforded by the jury's "common-sense judgment"[19] and its capacity to "maintain a link between contemporary community values and the penal system." Woodson v. North Carolina, supra, 428 U.S. at 295.

Alabama's requirement that juries "shall" impose a death sentence upon a finding of guilt is also at odds with the premises which underlie the Woodson ruling. Woodson stressed that jurors have an "aversion . . . to mandatory death penalty

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19 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

statutes [that is] shared by society at large." 428 U.S. at 295. Woodson also stated that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers." 428 U.S. at 296. Woodson's holding that it was unconstitutional to eliminate any chance for this societal outlook to be expressed in the sentencing process applies equally to Alabama's jury sentence provision.

Granting Alabama trial judges power to reverse the jury's initial mandatory sentence does not remedy this defect any more adequately than appellate review of sentence would have saved the statutes invalidated in Woodson and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). In either situation, input of "contemporary community values" at the grass-roots level is impermissibly curtailed.

It is true that in Proffitt v. Florida, 428 U.S. 242, 252 (1976), this Court stated that "it has never suggested that jury sentencing is constitutionally required." 428 U.S. at 252. But Alabama's provision for jury sentencing is radically different from the Florida law upheld in Proffitt. The Proffitt ruling was based on the premise that Florida juries play an important role in sentencing by considering the same aggravating and mitigating circumstances as the judge, and by making an advisory recommendation to the judge. 428 U.S. at 248. Alabama's law gives no such role to the jury, but instead injects the jury into the sentencing process without allowing it to consider mitigating and aggravating circumstances contrary to this Court's rulings in Woodson and Roberts.

Second, even if one assumes that there is no need for jury participation in capital sentencing, Alabama's law raises the question whether, in the event a state opts for jury partici-

pation, it can foreclose the jury from consideration of mitigating and aggravating circumstances. This issue has never been decided by this Court.

An Alabama capital jury's mandatory sentence is a meaningful and significant part of the sentencing procedure. It must necessarily affect the trial judge's subsequent sentencing determination. See Point III, infra. In view of the fact that Alabama's trial judges affirmed juries' mandatory death sentences in 37 of the first 45 cases after Alabama's law went into effect, there is solid reason to believe that the law has none of the benefits of judge-imposed sentencing noted in Proffitt, 428 U.S. at 252-53, and contains many of the defects of mandatory sentencing invalidated in Woodson.

This case squarely presents the question which this Court reserved in Lockett, namely, what role, if any, the jury may play in capital sentencing. 98 S.Ct. at 2967, n.16.

III.

ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT POSTPONES CONSIDERATION OF SENTENCE UNTIL THE JURY HAS MANDATORILY MADE AN INITIAL DETERMINATION THAT THE DEATH SENTENCE "SHALL" BE IMPOSED

By postponing the trial judge's consideration of aggravating and mitigating circumstances until after the jury has imposed its own unguided mandatory sentence, Alabama's law infringes petitioner's rights to an unprejudiced, passion-free sentencing determination before the judge.

This Court has long stressed the importance, particularly in capital cases, of making all efforts to ensure that defendants are tried and sentenced in an atmosphere which appears free

of undue passion and prejudice. Thus, Gardner v. Florida, 430 U.S. at 358, held that "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." See also Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1964); Irvin v. Dowd, supra.[20]

Common sense, as well as the 82% death sentence rate during the first 33 months of the Alabama law's operation,[21] dictates that Alabama trial judges' review of juries' initial death sentences cannot satisfy the requirement of a sentencing proceeding which is -- and appears to be -- free of caprice or emotion.

There is no question that the jury's mandatory sentence in this case was a significant act which affected the trial judge's subsequent sentencing determination. Alabama's law states that the judge can impose the death sentence only after "weighing . . . the fixing of punishment at death by the jury." § 13-11-4. The trial judge was also confronted with the provision of Alabama's death penalty law which allowed him to sentence petitioner to death if there was only one aggravating circumstance present. § 13-11-4. This provision meant that an aggravating circumstance finding was justified on the basis of a guilty verdict alone. Thus, the statute's list of aggravating circumstances included the following: "The capital felony was committed while the defendant was engaged or was an accomplice in the commission

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20 Even without evidence of actual prejudice, this Court has invalidated statutes on the ground of institutional pressures which those laws inescapably placed on the judge. E.g., Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

21 Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama, n.2, supra at 10.

. . . of robbery. . . ." § 13-11-6(4). Because the jury had already found petitioner guilty of robbery-intentional killing, this aggravating circumstance -- enough to justify sustaining the jury's sentence -- was automatically present, as the judge found (Tr. 812-13).

In these circumstances, Alabama's provision for trial judge review of the jury's previous sentence cannot be squared with this Court's rulings on the need for maintaining the appearance of utmost independence, impartiality and dispassion on the part of sentencing judges.

IV.

THE AGGRAVATING CIRCUMSTANCE PROVISION OF ALABAMA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONALLY VAGUE AND HAS BEEN SO INCONSISTENTLY APPLIED THAT IT DOES NOT COMPLY WITH THIS COURT'S FURMAN DECISION AND THE VOID-FOR-VAGUENESS DOCTRINE

The trial judge's decision to sustain the jury's death sentence rested in part on his finding, pursuant to the aggravating-circumstance provision of Alabama's law (§ 13-11-6), that petitioner's crime was "especially heinous, atrocious, or cruel" (Tr. 813).

On its face, this aggravating-circumstance provision is so broad and vague that it raises a serious question as to whether it gave petitioner -- or any other Alabama capital defendant -- reasonable notice as to the circumstances under which he might receive a death sentence. As stated by one Alabama trial judge who refused to make an "especially heinous, atrocious, cruel" finding in a recent capital case:

> "'The capital felony was especially heinous, atrocious, or cruel.' Well, I didn't really know what they're talking about there. I'll say at best this felony was totally senseless. I don't know about cruel, what people's different definitions of atrocious, heinous or cruel is - whether they're talking about torture or what, but if robbing somebody and taking their money and then shooting them through the heart is considered heinous then this crime was heinous. I don't know that that's what they're talking about. I'll be honest with you, I really don't know." Quoted in Ex parte Recardo Cook (Ala. Supreme Court, No. 77-320, Sept. 15, 1978), slip op., p. 22 (Maddox, J. concurring).

In petitioner's case, which also involved robbery and allegedly intentional killing, but where an "especially heinous" finding was made, the trial judge did not even consider the provision's ambiguity and invoked the provision perfunctorily.

This disparity graphically demonstrates that this provision has been applied so inconsistently that Alabama's system for adjudicating capital cases has the same potential for capricious, discriminatory application that this Court condemned in Furman. See also Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (due process violated by vague statute because "there are no standards governing the exercise of the discretion granted by the ordinance" and "the scheme permits and encourages an arbitrary and discriminatory enforcement of the law").

Appellate proceedings in this case provided no guidance as to the meaning of this provision. Moreover, unlike the appellate review of death sentences approved in Gregg v. Georgia, supra, 428 U.S. at 198, the Alabama appellate courts made no serious effort to ensure that the factual situation and aggravating circumstances in this case were similar to others where the death penalty was imposed.[22]

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22 The only relevant finding on appellate review was that "the facts in this case, after a careful evaluation, show a marked (Footnote Continued)

In sum, Alabama's inability to apply this vague sentencing provision with any consistency underscores the need for this Court to delineate the limits which the void-for-vagueness doctrine imposes on capital sentencing provisions.

V.

THE OVERALL OPERATION OF ALABAMA'S DEATH PENALTY STATUTE IS SO PREJUDICIAL TO PETITIONER'S RIGHTS AT BOTH THE GUILT AND SENTENCING STAGES THAT IT VIOLATES THE DUE PROCESS CLAUSE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

This Court has never departed from the principle announced in Witherspoon "that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." 391 U.S. at 521-22, n.20. In its overall operation, taking into account each successive stage of the trial, sentencing and appellate process, Alabama's death penalty statute offends this principle.

At each stage of Alabama's capital punishment proceedings, petitioner was deprived of significant procedural safeguards. At trial, the protection afforded by the beyond-reasonable-doubt standard was undermined because he could not receive a lesser-offense instruction. Nor was petitioner given a chance to appeal to the jurors' standards of decency with evidence of miti-

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22 (Footnote Continued)

similarity with those in Jacobs v. State, [361 So.2d 607]." Beck v. State, 365 So.2d 985, 1005 (Ala Crim. App. 1978). This conclusion is simply implausible. Even construing the facts in this case most favorably for the prosecution, petitioner's case has little in common with the Jacobs case. In its affirmance of the Court of Criminal Appeals decision, the Alabama Supreme Court undertook no independent review of the facts of the case. Beck v. State, 365 So.2d 1005-06 (Ala. 1978).

gating circumstances relevant to the issue of whether a death sentence should be imposed. The "conscience of the community" was effectively eliminated in petitioner's sentencing proceeding. The restraints imposed by Alabama's law meant that the jury acted as a "tribunal organized to return a verdict of death,"[23] which is precisely what this Court condemned in Witherspoon, Woodson, and Roberts.

No capital punishment statute in any state other than Alabama imposes such severe restraints on the jury's capacity to find facts fairly on the issue of guilt and to express the community's standards of decency on the issue of the death sentence. Alabama's idiosyncratic death penalty statute is even less representative of this nation's overall societal outlook on the issue of capital punishment than the several mandatory death penalty statutes invalidated by this Court's rulings in Woodson and successor cases.

Nor is Alabama's statute saved by its provision for review by the trial judge and the appellate courts of the jury's mandatory imposition of the death sentence. During the first 33 months of the Alabama statute's operation, Alabama trial judges affirmed the sentences of 37 of the 45 capital defendants convicted and sentenced to death by the jury. This is a strong indication that the trial judges' decisions have been impermissibly influenced by the juries' initial mandatory sentences. It also confirms that Alabama's administration of capital punishment cannot be squared with this Court's view "that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murder-

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23 Witherspoon v. Illinois, supra, 391 U.S. at 521.

ers." Woodson v. North Carolina, supra, 428 U.S. at 296.

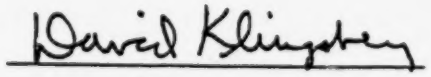
Finally, as demonstrated in this case, Alabama's sentencing provision with respect to aggravating circumstances is unduly vague and has been inconsistently applied by Alabama's trial and appellate courts. Alabama's appellate review of death sentences has neither cured the vagueness problem nor insured that death sentences are imposed with the rationality and fairness required by this Court's decisions in Furman, Gregg, Proffitt and Jurek.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

Dated: May 1, 1979

Respectfully submitted,



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APPENDIX

APPENDIX A AND APPENDIX B, THE OPINIONS OF THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA CAN BE FOUND IN THE PRINTED APPENDIX VOLUME AT PAGES 17 AND 53.

Supreme Court of the United States

APPENDIX C

No. A-758

GILBERT FRANKLIN BECK,

Petitioner,

v.

ALABAMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 1, 19 79

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 26th day of February, 19 79

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
BY
Deputy

APPENDIX D.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when

the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the

aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

13-11-5. Conviction and sentence to death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

15-17-1. Verdict may be for lesser offense than charged; verdict for offenses included in offense charged.

When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor. (Code 1852, § 647, Code 1867, § 4199; Code 1876, § 4904; Code 1886, § 4482; Code 1896, § 5306; Code 1907, § 7315; Code 1923, § 8697; Code 1940, T. 15, § 323.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No.

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GILBERT FRANKLIN BECK, Petitioner

v.

STATE OF ALABAMA

_____

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of April, 1979, copies of a petition for writ of certiorari to the Supreme Court of Alabama, and a motion to proceed in forma pauperis were mailed first class airmail, postage prepaid to the Hon. Charles Graddick, Attorney General, State of Alabama, and to the Hon. James Hampton, Assistant Attorney General, 64 North Union Street, Montgomery, Alabama 36104. I further certify that all parties required to be served have been served.

David Klingsberg

DAVID KLINGSBERG
Counsel for Petitioner